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Supreme Court of the United States

OCTOBER TERM, 1948

No. 35

GEORGE T. GOGGIN, TRUSTEE IN BANKRUPTCY OF THE ESTATE OF KESSCO ENGINEERING CORPORATION, PETITIONER,

vs.

DIVISION OF LABOR LAW ENFORCEMENT, STATE OF CALIFORNIA, STATUTORY ASSIGNEE OF CERTAIN PRIOR WAGE CLAIMANTS

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 9, 1948.

CERTIORARI GRANTED MARCH 29, 1948.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 667

GEORGE T. GOGGIN, TRUSTEE IN BANKRUPTCY OF THE ESTATE OF KESSCO ENGINEERING CORPORATION, PETITIONER,

vs.

DIVISION OF LABOR LAW ENFORCEMENT, STATE OF CALIFORNIA, STATUTORY ASSIGNEE OF CERTAIN PRIOR WAGE CLAIMANTS

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

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IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA

DEBTOR'S PETITION—Filed March 26, 1946

To the Honorable Judge of the District Court of the United States for the Southern District of California, Central Division. 44329-B

The Petition of Kessco Engineering Corporation a California corporation, in the County of Los Angeles District and State of California and in the business and occupation of tool and *dye* works.

Respectfully Represents: That it is a corporation duly organized and existing under and by virtue of the laws of California and has had its principal place of business for the greater portion of six months next immediately preceding the filing of this petition, at 2121 San Fernando Road, Los Angeles, California, within said judicial district; that it owes debts which it is unable to pay in full; that it is willing to surrender all its property for the benefit of its creditors; except such as is exempt by law, and desires to obtain the benefit of the Act of Congress relating to Bankruptcy;

That the Schedule hereto annexed, marked "A" and verified by your petitioner's oath, contains a full and true statement of all debts, and (so far as it is possible to ascertain) the names and places of residence of its creditors, and such further statements concerning such debts as are required by the provisions of said act

That the Schedule hereto annexed marked "B" and veri-
[fol. 3] fied by your petitioner's oath, contains an accurate inventory of all its property, both real and personal, and such further statements concerning said property as are required by the provisions of said Acts;

Wherefore, your petitioner prays that it be adjudged by the Court to be bankrupt within the purview of said Acts.

Kessco Engineering Corporation, a California corporation, Petitioner, by Tennis W. Swedell, Vice-President or Secretary. (Corporate Seal.) Cobb & Utley and Albert Lee Stephens, Jr., by ——, Attorney for Petitioner.

Oath to Petition

United States of America, Southern District of California etc. (Verified.)

[File endorsement omitted.]

[fol. 4] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF CALIFORNIA

ORDERS OF ADJUDICATION AND OF GENERAL REFERENCE—Filed March 26, 1946

At Los Angeles, in said District, on March 26, 1946,

The respective petitions of each of the petitioners in the proceedings hereinafter mentioned, filed on the respective dates hereinafter indicated, that he be adjudged a bankrupt under the Act of Congress relating to bankruptcy, having been heard and duly considered; and there being no opposition thereto;

It is adjudged that each of said petitioners is a bankrupt under the Act of Congress relating to bankruptcy; and

It is thereupon ordered that the said proceedings be, and they hereby are, referred generally to the referees in bankruptcy of this Court, whose names appear opposite the respective proceedings hereinafter mentioned, to take such further proceedings therein as are required and permitted by said Act, and that each of the said bankrupts shall henceforth attend before said referee and submit to such orders as may be made by him or by a Judge of this Court relating to said bankruptcy.

Number: 44,329-B. Title of Proceedings: Kessco Engineering Corporation, a corporation. Filed 3-26-46. Referee: Benno M. Brink, Esq., Los Angeles, Calif.

Paul J. McCormick, United States District Judge.

[File endorsement omitted.]

[fol. 5] IN UNITED STATES DISTRICT COURT

PETITION FOR ORDER TO SHOW CAUSE RE: TAX & LABOR CLAIMANTS

To the Hon. Benno M. Brink, Referee in Bankruptcy:

Comes now your petitioner George T. Goggin and respectfully represents as follows:

I

That he is the duly elected, qualified and acting Trustee in bankruptcy in the within bankruptcy proceedings.

II

That the Collector of Internal Revenue and Department of Employment of the State of California have filed certain tax claims in the within bankruptcy proceedings, each agency claiming a lien upon the assets in the hands of your Trustee; that in addition thereto certain labor claimants have asserted prior labor claims having filed their claims either through the Division of Labor Law Enforcement of the State of California or individually as follows:

Marc J. Thompson	Edward G. English
Fay Friedenthal	Joseph H. Thibodeau
Lester M. Laing	Harold L. Raoth
John C. Hawthorne	John E. Jaeger
Alvin Milfs	Joseph B. Grace
Lester Campbell	Joseph Rand Morphis
Herman Sam Watson	Henry S. Hansen
[John S. Hansen]*	John H. Muller
Leslie C. Clayton	Ralph Trotter
Gerald H. Grotbeck	Lawrence M. Marinez
Nicholas DiBarardino	Harry T. Rountree
Carl E. Englehard	Jean Ghislain.

[fol. 6]

III

That it now appears your petitioner will not have sufficient funds in the within estate to pay all of said claims in full and there is a need for determining the manner in which

* Erased in Copy.

the expenses of administration, the prior labor claims and the taxes shall be paid, and whether or not there shall be a priority of payments granted to any one or more of the claimants as described hereinabove.

Wherefore, your petitioner prays that this court issue an order directing the above named persons to appear before this Court on a day certain and show cause why the order of priority of the payment of their claims and of the expenses of administration should not be determined by this Court.

Dated this October 4, 1946.

George T. Goggin, Trustee.

Martin Gendel, Attorney for Trustee.
(Verified.)

(Endorsed:) Filed Oct. 17, 1946 at 25 Min. past 3 o'clock PM. Benno M. Brink, Referee. Florence Robinson, Clerk. —M. Filed Jan. 20, 1947 at — Min. past 5 o'clock PM. Edmund L. Smith, Clerk by F. Betz Deputy.

[fol. 7] In United States District Court

Order to Show Cause Re: Priority of Various Tax and Labor Claimants—Filed October 18, 1946

Upon reading and filing the verified petition of George T. Goggin and upon motion of Martin Gendel his counsel and good cause appearing therefor, it is hereby ordered that the persons named in said petition for order to show cause, to-wit: Collector of Internal Revenue and Department of Employment of the State of California, Marc J. Thompson, Edward G. English, Fay Friedenthal, Joseph H. Thibodeau, Lester M. Laing, Harold L. Raoth, John C. Hawthorne, John E. Jaeger, Alvin Milfs, Joseph B. Grace, Lester Campbell, Joseph Rand Morphis, Herman Sam Watson, Henry S. Hansen, [John S. Hansen]* John H. Muller, Leslie C. Clayton, Ralph Trotter, Gerald H. Grotbeck, Lawrence M. Marinez, Nicholas Di Berardino, Harry T. Rountree, Carl E. Engelhard and Jean Ghislain, appear before this Court on the 30 day of October, 1946, at the hour of 10

* Erased in copy.

o'clock a. m., or as soon thereafter as counsel can be heard, in the court room of the undersigned Referee located on the 3rd floor of the Federal Building, Temple and Spring Streets, Los Angeles, California, and then and there show cause why the petition of the Trustee, a copy of which accompanies the within order to show cause, should not be granted, and why this court should not determine the priority and method of payment of the expenses of administration, tax claimants and prior labor claimants.

[fol. 8] It is further ordered that a copy of the within order to show cause, and petition therefor, may be served upon each of the above named respondents by depositing the same in an envelope duly addressed and stamped at the addresses shown on the claim sheet now on file in the within bankruptcy proceedings, and by depositing it in the United States Mail at least five days before the date of the above hearing.

Dated this 18 day of October, 1946.

Benno M. Brink, Referee in Bankruptcy.

[Endorsed:] Filed Oct. 18, 1946 at 30 Min. Past 9 o'clock P. M. Benno B. Brink, Referee. Florence Robinson, Clerk. Filed Jan. 20, 1947 at —— Min. past 5 o'clock P. M. Edmund L. Smith, Clerk, by F. Betz, Deputy.

[fol. 9] In United States District Court

Findings of Fact and Conclusions of Law and Order—December 12, 1946

Upon reading and filing the verified petition of George T. Goggin, as Trustee in the within bankruptcy proceedings, for an order to show cause re: priorities of various tax and labor claimants, and an Order to Show Cause having been duly issued pursuant thereto, and due service having been made upon all the named respondents, and the matter having duly come on for hearing before the undersigned Referee, in his courtroom located on the 3rd floor of the Federal Building on the 30th day of October, 1946, the Trustee being represented by his counsel Martin Gendel; the respondent Collector of Internal Revenue of the United States being represented by his counsel Loren P. Oakes, and the State of California, Department of Employment, being

represented by its counsel J. Lafferty, and the Division of Labor Enforcement, Department of Industrial Relations, being represented by Edward M. Belasco, appearing on behalf of the labor claimants, and evidence having been duly introduced by stipulation, documents or oral testimony, and the matter having been duly submitted for decision, and good cause appearing therefor, the undersigned does hereby make the following Findings of Fact:

Findings of Fact

I

That prior to the commencement of the within bankruptcy proceedings, to-wit: on or about March 26, 1946, the Col- [fol. 10] lector of Internal Revenue was in physical possession of the personal property of the within bankrupt having made a seizure pursuant to the tax claims of the Collector of Internal Revenue against the bankrupt entity, which tax claims are more specifically described in Exhibit "A" which is attached hereto and made a part hereof as though set forth verbatim; that in addition to having made a physical seizure of the personal property, the Collector of Internal Revenue, prior to March 26, 1946, had filed notices of lien with respect to various taxes, including the tax claims set forth in the said Exhibit. The foregoing Exhibit includes items of taxes, penalties and interest to August 21, 1946, together with lien costs in the amount of $8.00, the total on such Exhibit being $40,921.94.

II

That in the within bankruptcy proceedings, the original claim filed by the Collector of Internal Revenue, and dated August 21, 1946, should be disallowed pursuant to stipulation with the Collector of Internal Revenue, and this claim is superceded by an amended claim of the Collector of Internal Revenue dated August 28, 1946, being in the gross amount of $78,865.03, and which amended claim included the items set forth in Exhibit "A" herein.

III

That on or about April 27, 1946, the Department of Employment of the State of California, filed a tax claim in

[fol. 11] the within bankruptcy, in the sum of $15,135.00, and it is further found that said tax claim was recorded as a lien on or about December 24, 1945.

IV

That in accordance with the petition of the Trustee in Bankruptcy, dated October 4, 1946, above referred to, the Labor Claimants specified in Paragraph II, had owing to them as of March 26, 1946, the date of the commencement of the within bankruptcy proceedings, prior labor claims for services rendered to the bankrupt within 90 days of bankruptcy, in the total sum of $2,838.79. That the Division of Labor, Law Enforcement, appears on behalf of all of said Labor Claimants.

V

That after the bankruptcy proceedings commenced, George T. Goggin was duly appointed as Receiver, and the personal property of the bankrupt in the hands of the Collector of Internal Revenue, as described hereinabove, was turned over to the said George T. Goggin, who accepted the terms and conditions of a telegram from J. P. Wenchel, Chief Counsel of the Bureau of Internal Revenue, reading as follows:

> "Reference to telephone conversation today with Mr. Webb relative to Kessco Engineering Corporation, Bankrupt, no objection by this office to Collector relinquishing personal property to Trustee for sale. Government's lien to attach to proceeds from sale subject to Trustee's expenses including costs of sale.
>
> [fol. 12] J. P. Wenchel, Chief Counsel."

From the above findings of fact, the undersigned Referee concludes as follows:

CONCLUSIONS OF LAW

1. That expenses of administration are payable from the funds now in the hands of the Trustee in Bankruptcy.

(a) That the Trustee in Bankruptcy has now on hand a sum of approximately $31,206.20 and at this time there doesn't appear to be any additional funds available for distribution into the within estate.

2. That the Collector of Internal Revenue has a lien superior to all other claimants, upon the balance of the aforesaid funds now in the hands of the trustee which will remain after the expenses of administration are paid, by reason of the aforesaid seizure made pursuant to the tax claims which are described in Exhibit "A" hereof.

Dated this 12 day of December, 1946.

Benno M. Brink, Referee in Bankruptcy.

From the above Findings of Fact and Conclusions of Law, it is hereby ordered:

1. That from the monies in the possession of George T. Goggin, as Trustee, there shall first be paid the expenses of administration.

2. That after the payment of the expenses of adminis- [fol. 13] tration, the balance of the aforesaid funds now in the hands of the Trustee shall be paid to the Collector of Internal Revenue in partial payment of the tax claims which are described in Exhibit "A" hereof, and the interest thereon as prescribed by law.

3. That if additional money shall come into the possession of the Trustee, the Court, upon notice to all necessary and proper parties, shall determine the respective liens or priorities, if any there be, of the Collector of Internal Revenue, the prior labor claimants, the Department of Employment of the State of California and such other tax claimants who may be entitled to be heard in the matter.

4. The claim of the Collector of Internal Revenue dated August 21, 1946, is hereby disallowed, such claim having been superceded by the Collector's above amended claim of August 28, 1946, which consists in part of the items set forth on Exhibit "A" hereto.

Dated: This 12 day of December 1946.

Benno M. Brink, Referee in Bankruptcy.

[fol. 14]

Exhibit "A" to Findings of Fact

Kessco Engineering Corporation
2121 San Fernando Road, L. A.

Nature of Tax	Period		Tax	Assessed Liability Penalty	Interest	Accrued Interest to 8-21-46	5% Penalty	Total
Federal Ins. Contr.	1/¼/45	(Bal)	$2,798.14	$.....	$18.99	$221.14	$*190.86	$3,229.13
"	2/¼/45		2,103.18	.....	.....	135.52	*105.16	2,343.86
"	3/¼/45		975.42	.....	.....	30.22	* 48.77	1,054.41
"	4/¼/45		448.16	.....	2.06	12.44	* 22.51	485.17
Federal Unemploy.	1944	(Bal)	804.48	.....	.....	51.04	* 40.22	895.74
Withholding	2/¼/45		15,372.74	.....	.....	988.07	*768.64	17,129.45
"	3/¼/45		6,056.90	*1,514.23	151.42	205.75	*386.13	8,314.43
"	4/¼/45		3,918.90	*391.89	39.19	115.90	*217.50	4,683.38
" (Final)	1/¼/46	(Bal)	744.61	.....	.....	22.16	* 86.33	853.10
Misc. Photo Appl.	July & Aug '45		1,625.51	121.58	16.29	73.72	* 88.17	1,925.27
			$34,848.04	$2,027.70	$227.95	$1,855.96	$1,954.29	$40,913.94
						Plus Lien Costs		8.00
								40,921.94

[Endorsed] Filed Dec. 12, 1946, at — Min. Past 9 o'clock A.M., Benno M. Brink, Referee; Florence Robinson, Clerk.
Filed Jan. 20, 1947, at — Min. past 5 o'clock P.M., Edmund L. Smith, Clerk, By F. Betz, Deputy.

[fol. 15] IN UNITED STATES DISTRICT COURT

PETITION FOR REVIEW OF REFEREE'S ORDER OF DECEMBER 12th, 1946

Comes now the Division of Labor Law Enforcement, by and through its attorneys, Pauline Nightingale and Edward M. Belasco, and filed this, its Petition for Review of that certain order made by Referee in Bankruptcy Benno M. Brink, Esquire, and entered in the above entitled proceeding on the 12th day of December, 1946, ordering and authorizing George T. Goggin, Trustee in Bankruptcy, who now has on hand a sum of approximately $31,206.20, no other funds appearing to be available for distribution, after payment of the expenses of administration, to pay to the Collector of Internal Revenue in partial payment of his tax claims and the interest thereon the balance of said sum.

Said order reads as follows, to-wit:

"From the above Findings of Fact and Conclusions of Law, it is hereby ordered:

"1. That from the monies in the possession of George T. Goggin, as Trustee, there shall first be paid the expenses of administration.

"2. That after the payment of the expenses of administration, the balance of the aforesaid funds now in the hands of the Trustee shall be paid to the Collector of Internal Revenue in partial payment of the tax claims which are described in Exhibit "A" hereof, and the interest thereon as prescribed by law.

[fol. 16] "3. That if additional money shall come into the possession of the Trustee, the Court upon notice to all necessary and proper parties, shall determine the respective liens or priorities, if any there be, of the Collector of Internal Revenue, the prior labor claimants, the Department of Employment of the State of California and such other tax claimants who may be entitled to be heard in the matter.

"4. The claim of the Collector of Internal Revenue dated August 21, 1946, is hereby disallowed, such claim having been superseded by the Collector's above

amended claim of August 28, 1946, which consists in part of the items set forth on Exhibit 'A' hereto.

"Dated: This 12th day of December, 1946.

"Benno M. Brink (signed) "Referee in Bankruptcy."

I

The Referee in Bankruptcy erred in ordering that after the payment of the expenses of administration there shall first be paid to the Collector of Internal Revenue in partial payment of his tax claims and the interest thereon the balance of the sum of $31,206.20 remaining in the possession of the Trustee in Bankruptcy.

II

The Referee in Bankruptcy erred in basing his order upon a conclusion of law that the Collector of Internal Revenue has a lien superior to all other claimants, upon [fol. 17] the balance of the aforesaid funds now in the hands of the Trustee in Bankruptcy which will remain after the expenses of administration are paid, by reason of the aforesaid seizure made pursuant to the tax claims of the Collector of Internal Revenue. Payment on the lien of the Collector of Internal Revenue must be postponed under the provisions of Section 67c of the Bankruptcy Act, set forth in paragraph III below until after payment of certain debts: Administration costs and prior labor claims, unless the said lien was enforced by a sale by the lien holder or it was accompanied by possession of the personal property. Since there was no sale by the lien holder and since possession of the personal property was relinquished by the lien holder to the Trustee in Bankruptcy, the lien is not superior to the prior labor claimants; mere seizure by the Collector of Internal Revenue does not give him the superior priority as concluded by the Referee in Bankruptcy.

III

The Referee in Bankruptcy erred in making his said order in that he failed to order the Trustee in Bankruptcy to pay from the balance of the funds in his possession after payment of the expenses of administration the prior wage claims of the labor claimants before all other creditors of the bankrupt, including the Collector of Internal Revenue,

in conformity with the provisions of Section 67c of the Bankruptcy Act, which provides as follows:

[fol. 18] "c. Where not enforced by sale before the filing of a petition in bankruptcy or of an original petition under chapter X, XI, XII, or XIII of this Act, though valid under subdivison b of this section, statutory liens, including liens for taxes or debts owing to the United States or to any State or subdivision thereof, on personal property not accompanied by possession of such property, and liens whether statutory or not, of distress for rent shall be postponed in payment to the debts specified in clauses (1) and (2) of subdivision a of section 64 of this Act, and, except as against other liens, such liens for wages or for rent shall be restricted in the amount of their payment to the same extent as provided for wages and rent respectively in subdivision a of section 64 of this Act."

IV

The Referee in Bankruptcy erred in making his order in that it is based on incomplete and erroneous findings of fact. Prior to the signing of the said order your Petitioner presented to the Referee in Bankruptcy certain proposed findings of fact, but these were not included in the findings of fact. At the hearing on October 30, 1946 before the Referee in Bankruptcy the question of the retention or loss of possession of the personal property of the bankrupt by the Collector of Internal Revenue after his seizure was a major legal point at issue, and certain facts admitted to or stipulated to by counsel for the Collector of Internal Revenue and counsel for the Trustee in Bankruptcy are [fol. 19] pertinent to the question of such possession. Your Petitioner respectfully urges that these facts should have been considered by the Referee in Bankruptcy in the making of his said order. The two factual situations are illustrated below in the proposed Findings of Fact submitted by your Petitioner and are as follows:

"Proposed Findings of Fact

"I"

"That prior to the commencement of the within bankruptcy proceedings, to-wit: on or about March 26, 1946, the Collector of Internal Revenue was in physical posses-

sion of the personal property of the within bankrupt having made a seizure pursuant to the tax claims of the Collector of Internal Revenue against the bankrupt entity, which tax claims are more specifically described in Exhibit 'A' which is attached hereto and made a part hereof as though set forth verbatim; that in addition to having made a physical seizure of the personal property, the Collector of Internal Revenue, prior to March 26, 1946, had filed notices of lien with respect to various taxes, including the tax claims set forth in the said Exhibit; that pursuant to its legal rights and remedies by virtue of the above seizure the Collector of Internal Revenue conducted a sale of this property, receiving bids thereon, but that the sale was not completed because the price obtainable was unsatisfactory to the Collector of Internal Revenue; that a second sale by the Collector of Internal Revenue was instituted but [fol. 20] abandoned when the Trustee in Bankruptcy persuaded the Collector of Internal Revenue to turn over to the Trustee in Bankruptcy the said personal property upon the assurance that he, the Trustee in Bankruptcy, could obtain a greater sale price for the said property under a Trustee's sale. The foregoing Exhibit includes items of taxes, penalties and interest to August 21, 1946, together with lien costs in the amount of $8.00, the total on such Exhibit being $40,921.94.

"Proposed Findings of Fact

"V"

"That after the bankruptcy proceedings commenced, George T. Goggin was duly appointed as Receiver; that following conversations between said George T. Goggin and counsel in the Los Angeles office of the Collector of Internal Revenue relating to the turning over of the personal property of the bankrupt to George T. Goggin, the following telegram was sent from J. P. Wenchel, Chief Counsel of the Bureau of Internal Revenue, to the Los Angeles office of the Collector of Internal Revenue:

"'Reference to telephone conversation today with Mr. Webb relative to Kessco Engineering Corporation, bankrupt, no objection by this office to Collector relinquishing personal property to Trustee for sale. Government's lien

to attach to proceeds from sale subject to Trustee's expenses including costs of sale.

J. P. Wenchel, Chief Counsel.'

[fol. 21] That the contents of the above telegram were imparted by telephone to a secretary in the office of said George T. Goggin; that no formal acceptance or acknowledgment was made by said George T. Goggin, no notices given to any creditors or other interested parties of the telegram, and no notice given at the time of the Trustee's sale of the contents of the telegram."

It is the contention of your Petitioner that: *First*, the actions of the attorneys for the Collector of Internal Revenue were not sufficient to constitute an agreement binding on all other interested parties in this bankrupt matter to the effect that the lien of the Collector of Internal Revenue would attach to the proceeds of the Trustee's Sale; and *Second*, no matter how formal an agreement of this type was it could not circumvent the provisions of Section 67c of the Bankruptcy Act. Therefore it is submitted that the Findings of Fact as they now stand are incorrect.

V

The Referee in Bankruptcy erred in making his Order in that he allowed expenses of administration as a priority over the lien holder, but did not allow the prior labor claims as a priority over the lien holder. In Section 67c of the Bankruptcy Act we find the words ". . . shall be postponed in payment to the debts specified in clauses (1) and (2) of subdivision a of Section 64 of this Act, . . .". If the lien was insufficient to precede the expenses of ad- [fol. 22] ministration, then *ipso facto* it was insufficient to precede the prior labor claims, since these two classes of debts are treated in the conjunctive and stand together. In the instant case to allow otherwise would be to make the Trustee in Bankruptcy a commission agent for the lien holder and not the representative of all the creditors; in short, as the Order now stands the Trustee in Bankruptcy conducted a lien sale for the benefit of the Collector of Internal Revenue. Once the Collector of Internal Revenue relinquished possession of the property to the Trustee in Bankruptcy and the property was liquidated, both classes

of debts mentioned above have preference in payment and not just the one of them so ordered.

Wherefore, your Petitioner prays that the said Order be reviewed and reversed, and a proper Order made giving the prior wage claims priority in payment over the lien claims of the Collector of Internal Revenue, and for such other and further relief, decrees and Orders as shall be meet in the premises.

Dated: Dec. 17, 1946.

Respectfully submitted, Edward M. Belasco, Attorney, Division of Labor Law Enforcement, Department of Industrial Relations, State of California.

(Endorsed): Filed Dec. 17, 1946, at 50 min. past 2 o'clock P. M. Benno M. Brink, Referee Florence Robinson, Clerk. Filed Jan. 20, 1947, at — min. past 5 o'clock P. M. Edmund L. Smith, Clerk by F. Betz, Deputy.

[fol. 23] IN UNITED STATES DISTRICT COURT

REFEREE'S CERTIFICATE ON PETITION FOR REVIEW OF ORDER IN RE DISBURSEMENT OF ASSETS OF ESTATE—Filed January 20, 1947

To the Honorable Campbell E. Beaumont, Judge of the Above Entitled Court:

I, Benno M. Brink, one of the Referees in Bankruptcy of said Court, before whom the above entitled matter is pending under an order of general reference, do hereby certify to the following:

The Division of Labor Law Enforcement of the State of California, hereinafter called the "petitioner on review", has duly filed its petition for the review of an order made by your Referee in this matter on December 12, 1946, in which he directed George T. Goggin, the trustee in this case, to distribute to the Collector of Internal Revenue all of the funds remaining in his possession in this matter, after the payment of the expenses of administration in the case, as allowed by the Court.

The trustee in this matter has liquidated all of the assets which have come into his possession and the funds which he has on hand are insufficient to pay in full the expenses of administration, the lien claims and the prior labor and prior tax claims in the case. The Collector of Internal Revenue and the Department of Employment of the State of California assert liens which were in effect at the time [fol. 24] of the commencement of this proceeding.

On October 17, 1946, the trustee filed his petition for an order to show cause requiring the lien claimants and the prior labor claimants, who are now all represented by the petitioner on review, to show cause why an order should not be made by your Referee determining the manner in which the trustee should disburse the funds in his possession. An order to show cause was issued on the said petition on October 18, 1946, and on October 30, 1946, a hearing was had before your Referee in the matter.

At said hearing it was conceded by all parties that at the time of the commencement of this proceeding, the Collector of Internal Revenue was in physical possession of all the assets later liquidated by the trustee in this case and it was further conceded that the Collector, at said time, had a valid lien on such assets superior to all other claimants in this matter. However, the petitioner on review contended that, after the commencement of this proceeding, the Collector, by surrendering the physical possession of the said assets to the then receiver in this case, lost the superior position which his lien had theretofore enjoyed, so far as the prior labor claimants in this case are concerned, and that, under Section 67(c) of the Bankruptcy Act, the lien of the Collector is subject to the payment of the prior labor claims in this case. Your Referee overruled the contentions of the petitioner on review and held that, under [fol. 25] the terms and conditions of the relinquishment by the Collector to the then receiver in this matter of the physical possession of the aforesaid assets, the Collector has a lien on the proceeds of the trustee's sale, superior to all other claimants, and subject only to the payment of the trustee's expenses, or, in other words, the expenses of administration as allowed by the Court. On December 12, 1946, your Referee signed and filed his formal findings of

fact, conclusions of law and order in the matter. It is from said order that this review is taken.

The Questions Presented

The sole question presented by this review is this: Does the Collector of Internal Revenue have a lien, superior to all other claimants, on the funds which will remain in the hands of the trustee in bankruptcy in this case, after the expenses of administration in this matter, as allowed by the Court, have been paid?

In its petition for review, the petitioner on review also makes the contention that, since your Referee directed that the expenses of administration in this matter should be paid before payment was made to the Collector of Internal Revenue on his lien, your Referee should likewise have directed, under the provisions of Section 67(c) of the Bankruptcy Act, that the claims of the prior labor claimants be paid. This contention of the petitioner on review arises from a misconception of your Referee's order in the mat-[fol. 26] ter. Your Referee did not direct the payment of the expenses of administration pursuant to Section 67(c) of the Bankruptcy Act. Your Referee ordered the expenses of administration to be paid, in advance of payment being made to the Collector of Internal Revenue, for the reason that the terms and conditions under which the trustee acquired possession of the assets which he later liquidated, as will hereinafter appear, provided for the payment of the trustee's expenses, including costs of sale. Your Referee construed the said words, "trustee's expenses, including costs of sale", to mean the expenses of administration in the case, as allowed by the Court.

The Evidence

The following is a summary of the evidence in this matter:

This proceeding began on March 26, 1946. On that date all of the assets, later liquidated by the trustee, were in the physical possession of the Collector of Internal Revenue. The Collector had previously made a seizure of the said assets pursuant to certain tax claims against the bankrupt, which tax claims are specifically described in Exhibit "A" of your Referee's findings of fact, conclusions of

law and order, a true copy of which is going up with this certificate. In addition to having made a physical seizure of the said assets, the Collector of Internal Revenue, prior to the commencement of this bankruptcy proceeding, had [fol. 27] filed notices of lien with respect to various taxes, including the tax claims set forth in the said Exhibit "A". Pursuant to his legal rights and remedies, by virtue of the said seizure, the Collector of Internal Revenue had conducted a sale of the said assets and had received bids thereon, but the said sale was not completed because the price obtainable was unsatisfactory to the Collector. A second sale by the Collector was instituted but was abandoned when the said assets were relinquished to the receiver in this matter, as hereinafter set forth.

On March 26, 1946, the day this proceeding began, George T. Goggin, now trustee, was appointed receiver in this matter. He qualified as such receiver on March 28, 1946. Upon his appointment and qualification, the said receiver contacted the office of the Collector of Internal Revenue and conversations were had between the receiver and counsel in the Los Angeles office of the Collector relating to the turning over of the said assets by the Collector to the receiver. Thereafter, the following telegram was received by the Los Angeles office of the Collector of Internal Revenue from J. P. Wenchel, Chief Counsel of the Bureau of Internal Revenue:

> "Reference to telephone conversation today with Mr. Webb relative to Kessco Engineering Corporation, bankrupt, no objection by this office to Collector relinquishing personal property to Trustee for sale. Government's lien to attach to proceeds from sale subject to Trustee's expenses including costs of sale.
> [fol. 28] J. P. Wenchel, Chief Counsel."

The contents of the said telegram were imparted by telephone to the office of the said receiver. No formal acceptance or acknowledgment thereof was made by the receiver. No notice of the telegram or of its contents was given to any of the creditors or other parties in interest in this matter and no notice thereof was given at the time of the trustee's sale of the aforesaid assets. After the said telegram had been imparted to the office of the said receiver, as aforesaid, the said receiver, with full knowledge of the

said telegram and of its contents and without any objection thereto, took over the possession of the said assets from the Collector of Internal Revenue. Later the said receiver, in his capacity as trustee, caused the said assets to be sold at public auction, pursuant to the order of this Court.

Findings of Fact, Conclusions of Law and Order of the Referee

A true copy of your Referee's findings of fact, conclusions of law and order in this matter is going up with this certificate.

Papers Submitted

For the information of the Court I hand up the following papers:

1. Petition for Order to Show Cause re: Tax & Labor Claimants, filed October 17, 1946.

[fol. 29] 2. Order to Show Cause re: Priority of Various Tax and Labor Claimants, dated October 18, 1946.

3. A true copy of Findings of Fact and Conclusions of Law and Order, filed December 12, 1946.

4. Petition for Review of Referee's Order of December 12th, 1946, filed December 17, 1946.

Respectfully submitted this 20 day of January, 1947.

Benno M. Brink, Referee in Bankruptcy.

[File endorsement omitted.]

[fol. 30] In United States District Court

Notice of Hearing of Petition for Review of Referee's Order of December 12th, 1946—Filed February 6, 1947

To: Division of Labor Law Enforcement, and to Pauline Nightingale and Edward M. Belasco, its attorneys; and to the Collector of Internal Revenue, and to Eugene Harpole and Loren P. Oakes, his attorneys:

You and Each of You Will Please Take Notice, and each of you is hereby notified that on Monday, February 24,

1947, at the hour of 10 o'clock a. m. of said date or as soon thereafter as counsel may be heard, at the courtroom of the Hon. Campbell E. Beaumont, Second Floor, Federal Building Temple and Spring Streets, Los Angeles, 12, California, the Petition for Review of the Order of the Hon. Benno M. Brink, Referee in Bankruptcy, dated December 12, 1946, will be brought on for hearing.

Dated at Los Angeles, February 5, 1947.

Martin Gendel, Attorney for Trustee.

(Affidavit of Service by Mail.)

[File endorsement omitted.]

[fol. 31] In United States District Court

Order Confirming Referee's Order—March 31, 1947

The petition of the Division of Labor Law Enforcement for review of Referee's order of December 12, 1946, having been heard by the Court, and counsel having argued the same and filed written argument, and the Court having duly considered the same, and being fully advised as to the facts and the law,

It Is Now Ordered that the said order of the Referee be, and it hereby is, confirmed in all respects, and the Court adopts the findings of fact and conclusions of law of the Referee as its own.

[fol. 32] IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed April 28, 1947

To the Honorable Campbell E. Beaumont, Judge of the Above Entitled Court; to the Honorable Benno M. Brink, Referee in Bankruptcy of the Above Entitled Court: To Edmund L. Smith, Clerk of Said Court:

You and each of you will please take Notice, and Notice is hereby given, that the Division of Labor Law Enforcement, State of California, statutory assignee of certain prior wage claimants in the above entitled bankruptcy proceeding, does hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the certain Minute Order dated March 31, 1947 entered in the Bankruptcy Docket confirming, in all respects the Order of the Referee in Bankruptcy, of December 12, 1946, and adopting the Findings of Fact and Conclusions of Law of the Referee as the Court's own.

Dated: April 28, 1947.

Edward M. Belasco, Attorney for Division of Labor Law Enforcement, Department of Industrial Relations, State of California.

[File endorsement omitted.]

[fol. 33] IN UNITED STATES DISTRICT COURT

SUPPLEMENT TO REFEREE'S CERTIFICATE ON PETITION FOR REVIEW OF ORDER IN RE DISBURSEMENT OF ASSETS OF ESTATE—Filed May 6, 1947

To the Honorable Campbell E. Beaumont, Judge of the Above Entitled Court:

I, Benno M. Brink, one of the Referees in Bankruptcy of said Court, before whom the above entitled matter is pending under an order of general reference, do hereby supplement by the following information my Referee's Certificate on Petition for Review of Order in re Disbursement of Assets of Estate heretofore filed with the Clerk of the above entitled Court on January 20, 1947.

The prior labor claims involved in the above entitled

matter and referred to in my Referee's Certificate on Petition for Review of Order in re Disbursement of Assets of Estate are listed herewith:

Division of Labor Law Enforcement		$448.48
Frank C. Berger	$96.00	
Glenn Lynn Legg	134.88	
R. C. Monroe	115.20	
Charles M. Weaver	102.40	
Marc J. Thompson		92.00
Faye Friedenthal		100.00
Edward C. English		256.08
Joseph H. Thibodeau		209.19
Lester M. Laing		288.85
Harold L. Raoth		111.60
John C. Hawthorne		79.20
John E. Jaeger		111.60

[fol. 34]

Alvin Milfs	104.40
Joseph B. Grace	83.20
Lester Campbell	93.80
Joseph Rand Morphis	190.00
Herman Sam Watson	72.00
Henry S. Hansen	64.00
John H. Muller	81.60
Leslie C. Clayton	123.75
Ralph Trotter	118.80
Gerald H. Grotbeck	108.00
Lawrence M. Marinez	97.20
Nicholas Di Barardino	114.40
Harry T. Rountree	125.52
Carl E. Engelhard	99.20
Jean Chislain	104.40
John R. Medberry	108.00
John Melzer	39.60
Total amount of prior labor claims	$3,424.87

Respectfully submitted this 6 day of May, 1947.

Benno M. Brink, Referee in Bankruptcy.

[File endorsement omitted.]

[fol. 35] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA

[Title omitted]

ORDER OF JUDGE ON PETITION FOR REVIEW OF REFEREE'S ORDER —May 21, 1947

At Los Angeles, in said District on the 21st day of May, 1947,

Upon the Petition for Review of the Division of Labor Law Enforcement, State of California, filed herein on December 17, 1946; and upon the Certificate of Referee in Bankruptcy, Benno M. Brink, filed herein on January 20, 1947: and upon all proceedings had before the Referee as appears from the Certificate and his Order, dated December 12, 1946, in which he held that after the payments of the expenses of administration the balance of the funds in the hands of the Trustee in Bankruptcy shall be paid to the Collector of Internal Revenue in partial payment of the tax claims; and upon the hearing held before this Court on February 24, 1947, the Trustee being represented by his counsel, Martin Gendel; the respondent Collector of Internal Revenue of the United States being represented by his counsel, Loren P. Oakes; the petitioner Division of Labor Law Enforcement of the State of California, being repre-[fol. 36] sented by its counsel Edward M. Belasco, the petitioner appearing on behalf of all prior wage claimants, said prior wage claims being set forth in the Supplement to Referee's Certificate on Petition for Review of Order in Re Disbursement of Assets of Estate, filed herein on May 6, 1947; and a Minute Order of this Court having heretofore been entered on March 31, 1947;

It is ordered that the Order of the Referee herein of December 12, 1946, is in all respects confirmed, and the Findings of Fact and Conclusions of the Referee are adopted as the Court's own.

Dated: May 21, 1947.

Campbell E. Beaumont, United States District Judge.

Judgment entered May 21, 1947. Docketed May 21, 1947. C. O. Book 43, Page 265. Edmund L. Smith, Clerk, by R. B. Clifton, Deputy.

[File endorsement omitted.]

[fol. 37] IN UNITED STATES DISTRICT COURT

PETITION FOR PERMISSION TO APPEAL IN FORMA PAUPERIS—
Filed April 25, 1947

STATE OF CALIFORNIA,
County of Los Angeles, ss:

I, Edward M. Belasco, being first duly sworn, depose and say:

That I am an attorney employed by the Division of Labor Law Enforcement, Department of Industrial Relations, State of California;

The the Division had assigned to it certain wage claims in the sum of $448.48 representing unpaid wages of four workers whose employer had been the bankrupt above; that in accordance with the provisions of Section 100 of the Labor Code the Division joined these claimants and filed on their behalf in the above-entitled matter Proof of Unsecured Debt in Bankruptcy (Priority);

That the wage claims are as follows: Frank G. Berger, Tool Maker, $96; Glenn Lynn Legg, Tool and Die Maker, $134.88; R. G. Monroe, Die Maker, $115.20; Charles M. Weaver, Tool and Die Maker, $102.40.

That in accepting the wage claims of the four laborers listed above it was determined that these men should not be required to obtain private counsel to recover the unpaid wages due them; that the Division's policy, upheld by the Appellate Courts of California, is that no working people supporting themselves and their families on the ordinary salary paid working people should be required to spend their own money to recover unpaid wages; that under [fol. 38] every-day conditions each worker needs all of his current earnings to meet ordinary living expenses. In MacDonald v. Neuner, 5 Cal. App. (2d) 751, where this matter was questioned the Court stated:

"Appellant's final contention is that respondent failed to show at the trial that his assignors were financially unable to employ counsel. This point, is based upon Act 4089, Deering's General Laws, which in defining the duties of the labor commissioner provides that he is to prosecute actions for wages and other demands 'of persons who in the judgment of the commissioner or his said representative are financially unable to em-

> ploy counsel'. The trial court made no finding on this subject; but evidence was introduced at the trial that the labor commissioner had made an investigation and had determined that such assignors were financially unable to employ counsel, and an allegation to that effect is contained in the complaint. . . . A finding to that effect was not at all necessary to an adjudication of the merits of the action."

That the Division of Labor Law Enforcement, more commonly known to the public as the "Labor Commissioner," is a statutory assignee of claims filed with it, whose only function in taking such assignment is to obtain the unpaid wages of a worker without any financial charge to the worker. No fees or charges are made to the worker for any services rendered, and if collection be through administrative procedure or civil action the worker receives all of the [fol. 39] wages collected; that Section 101 of the Labor Code states in part: "When a civil action is brought by the Division no court costs of any nature shall be payable by the Division;" that the Division of Labor Law Enforcement does not have any appropriation from the State Legislature nor from the State Department of Finance for court costs, or costs of appeal; that the Division has not had in the past, nor does not have now, any funds set aside for such costs; that the Division is only authorized under Section 101 to be charged with keeper's fees, mileage fees, and storage charges payable to any Sheriff, Marshal or Constable.

Your Petitioner respectfully urges that the Court take a liberal view of this situation and grant this request for the right to appeal without the payment of costs, on the basis that the statute 28 U. S. C. A. 832, does not require one to be absolutely destitute, or so impoverished as to be a public charge, to come within the purview of the state statute; that the word "pauper" be deemed to mean one upon whom it would be a great hardship if he be required to borrow money or exhaust his meagre savings to pay court costs.

That the question on appeal in this bankruptcy matter concerns an interpretation of Section 67c of the Bankruptcy Act as amended in 1938 determining a point of law of first impression, the meaning of the word "possession" as used

in the said section; that the said issue is of vital interest not only to these workers but to all prior wage claimants in bankruptcy cases; that this question should be passed on by the Circuit Court of Appeals.

[fol. 40] That, therefore, the undersigned requests that the Division of Labor Law Enforcement, statutory assignee of the prior wage claimants, be allowed to prosecute his appeal to conclusion without being required to pay fees or costs, or any security therefor.

Dated: April 24, 1947.

Respectfully submitted, Edward M. Belasco, Attorney, Division of Labor Law Enforcement, Department of Industrial Relations, State of California.

Subscribed and sworn to before me this 24th day of April, 1947. Marguerite Reese, Notary Public in and for the County of Los Angeles, State of California. My Commission expires June 15, 1947. (Seal.)

[File endorsement omitted.]

[fol. 41] In United States District Court

Affidavit for Permission to Appeal in Forma Pauperis—Filed April 25, 1947

State of California,
County of Los Angeles, ss:

I, Frank G. Berger, being first duly sworn, depose and say:

That I am a citizen of the United States, entitled to commence or defend any suit or action, civil or criminal, in any court of the United States;

That because of my poverty I am unable to pay the costs of an appeal or to give security for the same;

That I believe I am entitled to the redress I seek by an appeal in the above entitled matter;

That a description of the nature of the appeal is set forth in an accompanying affidavit by Edward M. Belasco, attorney for the Division of Labor Law Enforcement of the State of California, to whom I have assigned my wage claim

against the above entitled bankrupt; that Edward M. Belasco has no financial interest in my bankruptcy claim and that any and all money recovered by the Division in my behalf will go to me, without any costs or charges of any nature whatsoever by the aforesaid Division or its attorneys;

That I live at 15445 Roxford Street, San Fernando, California; that I am employed as a machinist at the rate of $1.50 per hour; that my weekly earnings are approximately $57 net take home pay; that I am married and my wife is not [fol. 42] working; that out of the aforesaid salary I support myself, my wife, my three minor children and my mother, all of whom live at the above address; that I am purchasing this home by making payments of $25 per month; that it cost me $4500 in 1942 and there now remains an $1800 balance owed; that I own a 1940 Pontiac automobile, which is used in my work; that I own no other real property, have no other source of income, own no stocks or bonds, and have less than $125 in the bank; that one of my children is now under medical care and what small savings I have will be used in payment of medical expenses.

Frank G. Berger.

Subscribed and sworn to before me this 23 day of April, 1947. L. A. Shelton, Notary Public in and for the County of Los Angeles, State of California. My Commission expires May 17, 1949. (Seal.)

[File endorsement omitted.]

[fol. 43] In United States District Court

Affidavit for Permission to Appeal in Forma Pauperis—Filed April 25, 1947

State of California,
County of Los Angeles, ss:

I, Charles M. Weaver, being first duly sworn, depose and say:

That I am a citizen of the United States, entitled to commence or defend any suit or action, civil or criminal, in any court of the United States;

That because of my poverty I am unable to pay the costs of an appeal or to give security for the same;

That I believe I am entitled to the redress I seek by an appeal in the above entitled matter;

That a description of the nature of the appeal is set forth in an accompanying affidavit by Edward M. Belasco, attorney for the Division of Labor Law Enforcement of the State of California, to whom I have assigned my wage claim against the above entitled bankrupt; that Edward M. Belasco has no financial interest in my bankruptcy claim and that any and all money recovered by the Division in my behalf will go to me, without any costs or charges of any nature whatsoever by the aforesaid Division or its attorneys;

That I live at 506 North Jackson Street, Glendale, California; that I am employed as a tool maker; that my weekly take home pay is $66.89; that I have one dependent besides myself who is supported out of the above salary; that my rent is $20 per month; that I own a 1939 Buick automo-
[fol. 44] bile, which is used in my work; that I have approximately $450 in my savings account; that I have no other property of any kind nor other source of income.

Charles M. Weaver.

Subscribed and sworn to before me this 18 day of April, 1947. Wesley S. Walder, Notary Public in and for the County of Los Angeles, State of California. My Commission expires Aug. 4, 1950. (Seal.)

[File endorsement omitted.]

[fol. 45] IN UNITED STATES DISTRICT COURT

AFFIDAVIT FOR PERMISSION TO APPEAL IN FORMA PAUPERIS—Filed April 25, 1947

STATE OF CALIFORNIA,
County of Los Angeles, ss:

I, R. G. Monroe, being first duly sworn, depose and say:

That I am a citizen of the United States, entitled to commence or defend any suit or action, civil or criminal, in any court of the United States;

That because of my poverty I am unable to pay the costs of an appeal or to give security for the same;

That I believe I am entitled to the redress I seek by an appeal in the above entitled matter;

That a description of the nature of the appeal is set forth in an accompanying affidavit by Edward M. Belasco, attorney for the Division of Labor Law Enforcement of the State of California, to whom I have assigned my wage claim against the above entitled bankrupt; that Edward M. Belasco has no financial interest in my bankruptcy claim and that any and all money recovered by the Division in my behalf will go to me, without any costs or charges of any nature whatsoever by the aforesaid Division or its attorneys;

That I live at 2408 West Avenue 32, Los Angeles 41, California; that my occupation is tool and die maker; that at present I am not working and, when working, support my sister; that my rent is $40 per month; that I have no savings account; that I own no real property and have no other [fol. 46] source of income.

R. G. Monroe.

Subscribed and sworn to before me this 23 day of April, 1947. Laura F. Coolidge, Notary Public in and for the County of Los Angeles, State of California. My Commission expires Oct. 21, 1949. (Seal.)

[File endorsement omitted.]

[fol. 47] IN UNITED STATES DISTRICT COURT

ORDER GRANTING PERMISSION TO APPEAL IN FORMA PAUPERIS—Filed April 25, 1947

Good cause appearing from the foregoing Affidavits of the three prior wage claimants and upon the application of Edward M. Belasco, Attorney, on behalf of the Division of Labor Law Enforcement, State of California, and there appearing to be merit in the appeal proposed, and that it is made in good faith,

It is hereby ordered, that the Division of Labor Law Enforcement, State of California herein may commence and prosecute to conclusion the above-entitled appeal to the United States Circuit Court of Appeals (including all appellate proceedings), without being required to prepay fee or costs or giving security therefor.

Campbell E. Beaumont, United States District Judge.

Dated: April 25, 1947.

[File endorsement omitted.]

[fol. 48] IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed May 21, 1947

To the Honorable Campbell E. Beaumont, Judge of the above entitled Court; To the Honorable Benno M. Brink, Referee in Bankruptcy of the above entitled court; To Edmund L. Smith, Clerk of said Court.

You and each of you will please take Notice, and Notice is hereby given, that the Division of Labor Law Enforcement, State of California, statutory assignee of certain prior wage claimants in the above entitled bankruptcy proceeding, does hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the Order of Judge on Petition for Review of Referee's Order, dated May 21, 1947 and entered in Civil Order Book 43, at Page 265, confirming in all respects the Order of the Referee in Bankruptcy, of December 12, 1946, and adopting the

Findings of Fact and Conclusions of Law of the Referee as the Court's own.

Dated: May 21, 1947.

Edward M. Belasco, Attorney for Division of Labor Law Enforcement, Department of Industrial Relations, State of California.

[File endorsement omitted.]

[fol. 49] IN UNITED STATES DISTRICT COURT

APPELLANT'S STATEMENT OF POINTS—Filed May 26, 1947

Comes now the Appellant, Division of Labor Law Enforcement, appearing on behalf of all prior wage claimants, and states that the Points upon which it intends to rely in the Appeal in this proceeding are as follows:

1. The Court erred in confirming the Order of the Referee herein, on December 12th, 1946, and adopting the Findings of Fact and Conclusions of Law of the Referee as the Court's own.

2. The Court erred in ordering that after the payment of the expenses of administration there shall be first paid to the Collector of Internal Revenue in partial payment of his tax claims and the interest thereon the balance of $31,231.20 remaining in possession of the Trustee in Bankruptcy.

3. The Court's Order is erroneous in that it is based upon a Conclusion of Law that the Collector of Internal Revenue has a lien superior to all other claimants.

4. The Court erred in failing to reverse the Order of the Referee and order the Trustee in Bankruptcy to pay from the balance of the funds in the Trustee's possession, after payment of the expenses of administration, the prior wage claims of the labor claimants before all other creditors of the bankrupt, including the Collector of Internal Revenue.

5. The Court erred in confirming the Referee's Order in that said order was based on incomplete Findings of Fact; [fol. 50] that said Findings of Fact failed to include all

the pertinent evidentiary matter set forth under the heading "*The Evidence*" in the Referee's Certificate on Petition for Review of Order in Re Disbursement of Assets of Estate.

6. The Court erred in not holding that the Collector of Internal Revenue lost the element of possession necessary under Section 67c of the Bankruptcy Act to avoid the postponement of payment of the statutory lien to prior wage claims.

7. The Court erred in confirming the Referee's Order in that said Order allowed expenses of administration as a priority over the statutory lien of the Collector of Internal Revenue but did not allow the same priority to the prior wage claims, despite the fact that expenses of administration and prior wage claims are treated in the conjunctive in Section 67c of the Bankruptcy Act.

8. The Court erred in not holding that a private agreement between the Collector of Internal Revenue and the Trustee in Bankruptcy was ineffectual in extending the statutory lien to the proceeds of the Trustee's sale to defeat the priority in payment of the prior wage claimants, under the provisions of Section 67c of the Bankruptcy Act.

Dated: May 26, 1947.

Edward M. Belasco, Attorney for Division of Labor Law Enforcement, Department of Industrial Relations, State of California.

(Affidavit of Service by Mail.)

[File endorsement omitted.]

[fol. 51] IN UNITED STATES DISTRICT COURT

APPELLANT'S DESIGNATION OF THE RECORD ON APPEAL—Filed May 26, 1947

Appellant, claimant in the above entitled proceeding, designates the following portions of the record on appeal in the above entitled proceeding:

1. Petition in Bankruptcy.

2. Adjudication and Order of Reference.

3. Petition for Order to Show Cause Re: Tax & Labor Claimants.

4. Order to Show Cause Re: Priority of Various Tax and Labor Claimants.

5. Findings of Fact and Conclusions of Law and Order of Referee in Bankruptcy.

6. Petition for Review of Referee's Order of December 12th, 1946.

7. Referee's Certificate on Petition for Review of Order in Re Disbursement of Assets of Estate.

8. Notice of Hearing of Petition for Review of Referee's Order of December 12th, 1946.

9. Minute Order of the United States District Judge entered on March 31st, 1947.

10. Petition for Permission to Appeal in Forma Pauperis and the three accompanying Affidavit- for Permission to Appeal in Forma Pauperis.

11. Order Granting Permission to Appeal in Forma Pauperis

12. Notice of Appeal, dated April 28th, 1947.

[fol. 52] 13. Supplement to Referee's Certificate on Petition for Review of Order in Re Disbursement of Assets of Estate.

14. Order of Judge on Petition for Review of Referee's Order.

15. Notice of Appeal, dated May 21st, 1947.

Dated: May 26, 1947.

Edward M. Belasco, Attorney for Division of Labor Law Enforcement, Department of Industrial Relations, State of California.

(Affidavit of Service by Mail).

[File endorsement omitted.]

[fol. 53] IN UNITED STATES DISTRICT COURT

ORDER EXTENDING TIME FOR FILING RECORD AND DOCKETING APPEAL—Filed June 9, 1947

It appearing that an Order Granting Permission to Appeal in Forma Pauperis having been filed in the above matter by the Division of Labor Law Enforcement on April 25, 1947, and,

It appearing that a Notice of Appeal having been filed by the Division of Labor Law Enforcement on April 28, 1947, from the Minute Order dated March 31, 1947, and entered in the Bankruptcy Docket, and a Notice of Appeal having been filed by the Division of Labor Law Enforcement on May 21, 1947, from the Order of Judge on Petition for Review of Referee's Order from the Minute Order, dated May 27, 1947, and entered in Civil Order Book 43, at Page 265, and

It further appearing that the appellant herein, the Division of Labor Law Enforcement, requires additional time within which to obtain from the Clerk of this Court, the record on appeal, and for the filing and docketing of the same;

Now, Therefore, on Motion of Edward M. Belasco, Esquire, Attorney for the Division of Labor Law Enforcement herein, and for good cause appearing therefor,

It Is Ordered that the Division of Labor Law Enforcement may have, pursuant to Rule 73 of the Federal Rules of Civil Procedure, 90 days from April 28, 1947, within which to file the record on appeal and docket the appeal.

Dated: June 9, 1947.

Campbell E. Beaumont, United States District Judge.

[File endorsement omitted.]

[fol. 54] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 55] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

Before Mathews, Stephens and Orr, Circuit Judges

ORDER OF SUBMISSION—November 7, 1947

Ordered appeal herein argued by Mr. Edward M. Belasco, counsel for appellant, and by Mr. Fred Youngman, Special Assistant to the Attorney General, counsel for appellee, Collector of Internal Revenue, and submitted to the Court for consideration and decision.

[fol. 56] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

Before Mathews, Stephens and Orr, Circuit Judges

ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF JUDGMENT—December 9, 1947

Ordered that the typewritten opinion this day rendered by this Court in above cause be forthwith filed by the clerk, and that a judgment be filed and recorded in the minutes of this court in accordance with the opinion rendered.

[fol. 57] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 11669

DIVISION OF LABOR LAW ENFORCEMENT, STATE OF CALIFORNIA, Statutory Assignee, etc., Appellant,

vs.

GEORGE T. GOGGIN, Trustee in Bankruptcy of the Estate of Kessco Engineering Corporation, and Harry C. Westover, Collector of Internal Revenue for the Sixth Collection District of California, Appellees

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division

OPINION—December 9, 1947

Before Mathews, Stephens and Orr, Circuit Judges

STEPHENS, Circuit Judge:

The Kessco Engineering Corporation, a California corporation, brought a voluntary petition in bankruptcy, and orders of adjudication and general reference were made on March 26, 1946. At that time the Collector of Internal Revenue had physical possession of the assets of said bankrupt pursuant to certain tax claims, notices of such liens having been filed. The property was put up for sale, but the sale was never completed because the price obtainable was unsatisfactory. The collector then relinquished the assets to the receiver in bankruptcy under an alleged agreement made by and between an official of the Bureau of Internal Revenue and the said receiver, George T. Goggin, in the following circumstances. The Los Angeles office of the collector was contacted in regard to the assets and their sales value by Goggin. A telegram was thereafter sent by the Bureau to the Los Angeles office as follows: "Reference to telephone conversation today with Mr. Webb [member of [fol. 58] the Los Angeles office of Internal Revenue] relative to Kessco Engineering Corporation, bankrupt, no objection by this office to Collector relinquishing personal property to Trustee for sale. Government's lien to attach to proceeds from sale subject to Trustee's expenses including costs of

sale." The information as to these transactions were received, but no formal acceptance or acquiescence by the receiver was ever made. No notice thereof was given to the creditors or other parties in interest, nor was any notice of an intended trustee's sale ever given them. The receiver, with knowledge of the telegram, took physical possession of the assets from the collector and later in the capacity as trustee caused the assets to be sold at public auction. What notice, if any, was given does not appear in the record. Prior wage claimants filed their wage claims against the assets through the Division of Labor Law Enforcement of California. The referee put the government's claim ahead of the wage claims to the same extent as though the lien on the property followed the proceeds of its sale. The district court confirmed, and the labor claimants appeal through the California Division of Labor.

The appellant takes the position that by surrendering possession of the assets to the receiver, the collector lost the superior position which he had theretofore enjoyed. It is contended that the coll-ctor, not having enforced his lien by sale, subjected himself and his claim to the provisions of Section 67(c) of the Bankruptcy Act [11 U.S.C.A. § 107c (1946)] when he appeared in the proceedings and voluntarily surrendered possession of personal property to the trustee, and that the alleged agreement heretofore detailed has no legal binding effect on statutory rights of prior wage claimants. It is also urged that, since the referee directed payment of expenses of administration prior to payment of the collector's lien, Section 67(c) of the Act makes it obligatory to also pay the labor claims before payment of the government's claim.

The referee's order and judgment in the district court upheld the superiority of the lien and approved the action on the agreement.

The appellees, in support of the judgment, urge that the agreement or conditions attached by the government to the release and sale of the personal property protected them against loss of superior position. The determination of this question rests upon the construction of Section 67(c) [fol. 59] of the Bankruptcy Act, which provides as follows: "Where not enforced by sale before the filing of a petition in bankruptcy or of an original petition under Chapter X, XI, XII, XIII of this Act, though valid under subdivision

b of this section, statutory liens, including liens for taxes or debts owing to the United States or to any State or subdivision thereof, on personal property not accompanied by *possession* [emphasis ours] of such property, and liens whether statutory or not, of distress for rent shall be postponed in payment of the debts specified in clauses (1) and (2) of subdivision a of section 64 of this Act, and except as against other liens, such liens for wages or for rent shall be restricted in the amount of their payments to the same extent as provided for wages and rent respectively in subdivision a of section 64 of this Act." Section 64a of the Act [11 U. S. C. A. § 104a (1946)] provides, respectively, for priority of expenses of administration and for wages of a restricted amount earned within a given time before bankruptcy proceedings, to be paid in advance of payment of dividends to creditors.

At the time the proceedings began, the collector had possession of the assets, but he subsequently relinquished them to the receiver and trustee in the already mentioned circumstances. Did the lien follow and attach to the sale proceeds?

The appellants contend that possession under the statute means *actual* possession prior to and subsequent to the filing of the petition in bankruptcy, whereas appellees contend that actual possession, which was enjoyed at the time the action in bankruptcy was commenced, need not be retained in order to protect priority in payment.

We agree with the Second Circuit in City of New York v. Hall, 139 Fed. 2d 935, in the holding that "possession" as used in Section 67(c) means actual possession, the purpose being to protect and give warning to creditors. In the instant case the government had actual possession, but it surrendered that possession by virtue of a bargain with the receiver without taking into account the wage and creditor claimants. The Act provides that wage claims come ahead of the government lien in distribution of the proceeds of sale of property not in possession of the government lien holder. The government lien holder must either sell the property under its lien or eventually surrender it into the [fols. 60-61] bankruptcy proceedings. We find no authority whatever for the proposition that the government can turn the property over to the trustee under a consent based upon the receiver's assurance that the lien shall continue upon the property and also upon the money it may bring when

sold as a part of the bankruptcy estate. It is our opinion that the wage claimants had certain statutory rights at the inception of the bankruptcy proceedings, and such rights remained throughout the proceedings, modified by the actual possession of the assets. The fact, as is claimed, that the receiver could make the sale to better advantage, is irrelevant, for the question is one of power and not of business judgment. The statutory requirements may not be disregarded through private agreements which affect others' rights without their consent.

In what circumstances, if at all, a statutory lien on personal property as a lien may be transferred to the proceeds of the sale of such property by agreement of all concerned need not be considered. Here we have a definite statutory provision based upon a well-understood reason limiting this lien to the actual possession of the property.

We think no argument is necessary or authorities required to support our conclusion that costs of administration come first in the distribution of proceeds derived from property which has been under the jurisdiction of the bankruptcy court.

The judgment is reversed, and the cause remanded for further proceedings in accordance with the views herein expressed.

[fol. 62] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 11669

DIVISION OF LABOR LAW ENFORCEMENT, STATE OF CALIFORNIA, etc., Appellant,

vs.

GEORGE T. GOGGIN, Trustee, etc., et al., Appellees

JUDGMENT—December 9, 1947

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division

This cause came on to be heard on the Transcript of the Record from the District Court of the United States for the Southern District of California, Central Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court that the order and judgment of the said District Court in this cause be, and each of them hereby is reversed, and that this cause be, and hereby is remanded to the said District Court for further proceedings in accordance with the opinion of this court, with costs in this court in favor of the appellant, and against the appellees.

It is further ordered and adjudged by this Court that the appellant recover against the appellees for its costs herein expended, and have execution therefor.

[File endorsement omitted.]

[fol. 63] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 64] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed March 29, 1948

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted, and the case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.